



Constitutional Protection for the Right to Abortion: From *Roe* to *Casey* to *Whole Woman's Health*

In its landmark ruling in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court recognized that the right to abortion is a fundamental liberty protected by the Fourteenth Amendment of the Constitution. Since *Roe* the Court has repeatedly reaffirmed the Constitution's protection for this essential liberty, which guarantees each individual the right to make personal decisions about family and childbearing. Accordingly, the Court has made clear that it cannot dismiss "the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992). Over the decades since the Court first held that the Constitution encompasses protection for the right to abortion, including its most recent decision, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016), it has also recognized that without access to abortion, the right is meaningless.

Roe built on earlier cases in which the Court held that the constitutional right to privacy protected an individual's rights to reproductive autonomy. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court struck down a ban on the use or sale of contraceptives to married couples because it violated the constitutional right to privacy. In another case, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extended this fundamental right to contraception to unmarried people. *Eisenstadt* elaborated on the right to privacy as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 488.

Protecting access to abortion effectuates vital constitutional values, including dignity, autonomy, equality, and bodily integrity. In its rulings on abortion, the Court recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *Casey*, 505 U.S. at 856. It has further acknowledged that "[a]t the heart of liberty is the right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 851.

Three key cases define the constitutional protection for a woman's right to abortion: *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Whole Woman's Health v. Hellerstedt*.

In *Roe*, the Court struck down Texas’s criminal ban on abortion and held that the right to terminate a pregnancy is a “fundamental right.” 410 U.S. at 155, 164. Along with decisions relating to marriage, contraception, education, and family relationships, the decision as to whether to terminate a pregnancy is fundamental to a woman’s “personal liberty.” *See id.* at 153. The Court thus recognized the great “detriment that the State would impose upon the pregnant woman by denying this choice,” including forcing her to endure health risks associated with pregnancy and the costs of bringing a child into a family not prepared for one. *Id.*

Like other fundamental rights, the right to abortion recognized in *Roe* was subject to strict scrutiny—the highest level of constitutional inquiry—which required that infringements on the right be narrowly tailored to serve a compelling government interest. The Court recognized two interests—potential life and women’s health—and announced that it would use the trimester system to determine when each of these state interests was compelling, disallowing state regulation of abortion in the first trimester, but permitting more regulation as pregnancy advanced. *See id.* at 164–65.

Over the nearly twenty years between *Roe* and *Casey*, the Court heard several abortion cases, but in *Casey* the Court addressed whether it should overturn its landmark decision in *Roe*. *Casey* resulted in splintered opinions, with no single opinion garnering majority support. A majority of justices, however, voted against overturning *Roe*. Justices O’Connor, Souter, and Kennedy issued a controlling joint opinion affirming its central holding: “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” *Casey*, 505 U.S. at 879. The *Casey* Court elaborated that abortion “involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy” and is “central to the liberty protected by the Fourteenth Amendment.” *Id.* at 851. It emphasized the fundamental values of dignity and equality that the abortion right reflects, observing that a woman’s experience is “too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of a woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.” *Id.* at 852.

Although the Court affirmed *Roe*’s holding that states cannot ban abortion prior to viability, the joint opinion departed from strict scrutiny and adopted the “undue burden” standard to determine which restrictions were unconstitutional. *See id.* at 877. This less-protective standard displaced strict scrutiny to recognize more fully the state’s interest throughout pregnancy in promoting potential life. *See id.* at 876–78. The undue burden standard thus aimed to give “real substance” to “the urgent claims of the woman to retain the ultimate control over her destiny and her body,” *id.* at 869, while permitting laws that are designed to inform her decision, *id.* at 877. Accordingly, the joint opinion explained that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878.

Casey was a challenge to an omnibus Pennsylvania law that imposed a 24-hour mandatory delay on women seeking abortion; state-mandated information (biased counseling) intended to persuade women to choose childbirth over abortion; and parental consent and spousal notice mandates, among other requirements. In earlier cases, the Court had struck down biased counseling and mandatory delay laws because they failed strict scrutiny. Applying the undue burden standard, however, Justices O’Connor, Souter, and Kennedy upheld the mandatory 24-hour delay, biased counseling, and parental consent

requirements, but struck down the requirement that a married woman’s husband be notified before she obtained an abortion.

After *Casey*, states passed hundreds of incremental restrictions on abortion and courts evaluating the constitutionality of these laws struggled to apply key features of the undue burden test. Some held that an abortion regulation is constitutional only when it actually promotes the interest the state claims it does and advances the interest to an extent that outweighs the burdens the law imposes on abortion access. See, e.g., *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (June 28, 2016). Other courts conducted no such inquiry, maintaining that an abortion regulation is constitutional if “any conceivable rationale” exists for its enactment. *Whole Woman’s Health v. Cole*, 790 F.3d 563, 587 (5th Cir.), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev’d and remanded sub nom. Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016).

Between *Casey* and *Whole Woman’s Health*, the Supreme Court heard just four cases challenging abortion restrictions, none of which provided a roadmap for how courts should determine whether laws imposed an undue burden. Just last term, *Whole Woman’s Health* supplied the missing guidance. *Whole Woman’s Health* clarified that the undue burden test is a form of heightened scrutiny that requires the courts to undertake a meaningful review of abortion restrictions. 136 S. Ct. 2292, 2309–10. More specifically, it made clear that the undue burden standard is a robust check on legislatures that requires courts to examine whether abortion restrictions have benefits that outweigh the burdens they impose and strike them if they fall short.

To apply the test, courts must evaluate whether an abortion restriction actually furthers a valid state interest—and not just whether a state offers a plausible explanation about how the restriction might relate to its asserted interest. *Id.* at 2310. In making this determination, courts cannot defer to a state’s claims about how the law does or might further its interests; it must conduct its own independent inquiry based on the evidence presented in the case. *Id.* Courts must then determine if the law confers benefits that outweigh the burdens it imposes on women, and declare the law unconstitutional if the burdens outweigh the benefits. *Id.* at 2309. When engaging in this balancing, courts must take into account whether the evidence is based on scientifically reliable methodology. See *id.* at 2309–10.

Applying this standard, *Whole Woman’s Health* struck down the two parts of a Texas law challenged in that case: the “admitting privileges” provision requiring all abortion providers to obtain local hospital admitting privileges, and the “ambulatory surgical center” provision requiring every licensed abortion facility to meet hospital-like building standards. *Id.* at 2313, 2318. While the State of Texas claimed that it enacted these laws to advance women’s health by making abortion safer, trial evidence showed that neither requirement offered any health or safety benefits. At the same time, evidence showed that they would cause most of Texas’s clinics to close, leaving the state with just a few clinics clustered in urban areas and thousands of women without adequate access. Because the burdens outweighed the benefits, the Court struck down both parts of the Texas law.

The victory in *Whole Woman’s Health* preserved abortion access for thousands of Texas women and signaled that laws similar to those challenged in that case are unconstitutional. Moreover, the test announced in *Whole Woman’s Health* applies to a broad range of abortion restrictions and is not limited to those that were challenged in Texas or similar laws.

Roe, *Casey*, and *Whole Woman's Health* develop a strong framework for protecting fundamental constitutional values of critical importance to women. For over four decades, women have relied on the protection the Court has repeatedly reaffirmed the Constitution affords to abortion, along with the underlying principles of liberty, dignity, equality, and bodily integrity the right reflects. Any nominee must recognize not only that the Constitution encompasses a woman's right to abortion, but also that it affords robust protection to that right.